2009

Richard Norris v. Utah Labor Commission, Harold Van Adams and/or Eninsured Employers Fund : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

RICHARD NORRIS, Petitioner/Appellant, v. UTAH LABOR COMMISSION, HAROLD VAN ADAMS and/or UNINSURED EMPLOYERS FUND, Respondents/Appellees.	Case No. 2009-0784 Labor Commission No.06–0127 **(Oral Argument Requested)**

BRIEF OF PETITIONER RICHARD NORRIS

PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR COMMISSION

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This appellate review proceeding arises from the Labor Commission's August 28, 2009, Order Amending ALJ's Decision and Affirming Denial of Benefits. The Utah Court of Appeals has jurisdiction to hear this case pursuant to Utah Code Annotated § 78A-4-103 (2009), § 63G-4-403 (2008), § 34A-2-801(8) (1997) and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: Was Petitioner, Richard Norris an employee of Respondent, Harold Van Adams or was he an independent contractor?

Standard of Review: This is a question of law which is reviewed under a broad abuse of discretion standard where appellate review gives no deference to the agency's determination, because the appellate court has the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction. Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah 1997). Such an Issue is reviewed for correctness. LaSal Oil Co. V. Department of Environmental Quality, 843 P.2d 1045 (Utah Ct. App. 1992). Sierra Club v. Utah Solid Hazardous Waste Control Board, 964 P.2d 335 (Utah Ct. App. 1998).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. E.g., State Tax Commission v. Industrial Commission, 685 P.2d 1051,

1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

Issue 2: Was Mr. Norris was in the course and scope of his employment with H. Van Adams when he injured his back while lifting an air compressor at the job site on December 26, 2005?

Standard of Review: This is a mixed question of law and fact on which this Court extends "heightened deference" to the Commission's determination "with varying degrees of strictness, falling anywhere between a review of 'correctness and a broad 'abuse of discretion' standard." Drake v. Industrial Commission, 939 P.2d 182 (Utah 1977).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. *See* citations above.

Preservation for Appeal: All of the above issues were raised by Petitioner before the Labor Commission. A Petition for Review was timely filed with this Court.

DETERMINATIVE STATUTE AND RULE

Utah Code Ann. § 34A-2-401 (2005) provides the overall statutory basis for an award of workers' compensation benefits to an employee arising out of and in the course of employment. Section 34A-2-102 (2005) of the Code fleshes out the definitions of "employer" and "employee" in determining workers' compensation

responsibilities.

STATEMENT OF THE CASE

Nature of the Case: The Petitioner seeks review of a final Order of the Utah Labor Commission denying his claim for worker's compensation benefits.

Course of Proceedings:

1. On February 6, 2006, Richard Norris filed an Application for Hearing with the Labor Commission of Utah seeking temporary total disability compensation, recommended medical care, and unpaid medical expenses on account of an injury arising out of and in the course of his employment with Respondent Harold Van Adams. (R1 at 1-3).

2. Notice of Formal Adjudicative Proceedings was sent out on March 3, 2006. (R1 at 8-9)

3. Respondent Van Adams filed an Answer on April 3, 2006. (R1 at 13-14) and Respondent Uninsured Employer's Fund ("UEF") filed their Answer on April 3, 2006. (R1 at 15-17).

4. A Notice of Formal Hearing was issued by the Labor Commission on April 5, 2006. (R1 at 18).

5. Respondent UEF filed a Pretrial Disclosure Form on May 23, 2006. (R1 at 21-23). Respondent Van Adams filed Pretrial Disclosures on June 19, 2006 and again on August 24, 2006. (R1 at 28-30, 45-49). Petitioner filed his Pretrial Disclosures on August 10, 2006. (R1 at 42-44).

6. Various Motions and letters to the Judge were filed before the hearing; however, because none of the Motions or letters are germane to the issues in this appeal, they are omitted for sake of clarity.

7. A Hearing was held on September 26, 2006 in Salt Lake City, Utah before Administrative Law Judge Lorrie Lima. On January 2, 2007, ALJ Lima entered Findings of Fact, Conclusions of Law and Order that although Petitioner was an employee of Respondent, his workplace injury occurred after his employment relationship had been terminated by the Respondent. She dismissed the case with prejudice. (R1 at 126-132, a copy of said Order is attached hereto as Addendum "A").

8. On February 1, 2007, Petitioner filed a Motion for Review of that decision with the Utah Labor Commission. (R1 at 133-146). Respondent UEF filed a Response to Motion for Review on February 19, 2007. (R1 at 147-170).

9. On August 28, 2009, the Labor Commission issued an Order Amending ALJ's Decision and Affirming Denial of Benefits. The Labor Commission adopted the ALJ's Findings of Fact, but found that there was no employer/employee relationship between the parties; rather that Petitioner was an independent contractor and that in any event his workplace injury occurred after his employment had been terminated. (R1 at 185-189, a copy of said Order is attached hereto as Addendum "B").

10. Petitioner timely filed a Petition for Review with this Court on September

25, 2009.

Statement of Facts: The relevant facts in this matter are as follows:

1. Respondent Harold Van Adams is the owner of certain rental property consisting of eight apartments and one duplex located in Midvale, Utah. Mark Warburton is Respondent's agent and manages the units, collecting the monthly rent from Respondent's tenants and serving as the contact person if a tenant needed any repairs. In response to a tenant complaint, Mr. Warburton would contact a repairman to perform the repair service. (R. at 127).

2. On or about November 22, 2005 Mr. Warburton hired Petitioner to "fix up" three vacant vandalized apartments owned by Respondent, so they could be rented again. "Fixing up" included among other things removing garbage, raking leaves, cleaning and repairing holes in walls, patching holes, painting, and a sand job. (*Id*, including footnote 2; see also R. 3 at 3- 4).

3. Petitioner testified that Mr. Warburton agreed to pay him $40.00 per hour and that his title was Job Foreman. (R3. at p. 3, 4). The Labor Commission found that the budget for the entire project was $1,500.00, including Petitioner's labor and supplies (R1 at 186, including footnote 1). Mr. Warburton told Petitioner to keep track of his hours and the cost of his supplies and gave Petitioner approximately $600.00 in cash to begin the job. Petitioner kept time sheets for the hours he and his helpers worked, as well as receipts for supplies he purchased for the job. (R. 3 at 14-17; R. 1 at 76-115).

4. Mr. Warburton provided Petitioner with some supplies and a trailer to haul away garbage and requested that he store his tools in a garage located on the rental property. (R. 1 at 128).

5. Petitioner's job was to do whatever Respondent or Mark Warburton asked him to do. (R. 3 at 4). For example, Petitioner testified that on Mr. Warburton's instructions, he hired others to assist him, and that Mr. Warburton instructed him on how much and how often to pay these workers. (R. 3 at 18-19, 21). Mr. Warburton denied giving Petitioner instructions with respect to hiring helpers. (R. 3 at 113-114, 134).

6. Petitioner testified that Mr. Warburton gave him a list of cleaning supplies to buy for these workers and told him to buy them inexpensively, such as at a dollar store. (R. 3 at 19-20, 21). Mr. Warburton denied giving such a list. (R. 3 at 134).

7. At Mr. Warburton's instruction, Petitioner boarded up windows, changed locks, replaced thermostats, repaired drywall, a pothole, a gutter spout and a toilet handle, tore out carpeting, determined where leaks occurred and purchased cleaning supplies and paint. Mr. Warburton asked Petitioner to change the locks on four of the apartments that were empty. Mr. Warburton asked Petitioner to replace some thermostats in the apartments (R. 3 at 41, 127, 131). At Mr. Warburton' request, Petitioner even showed a rental unit to a prospective tenant. Mr. Warburton gave Petitioner a Rental Application for the tenant. (R. 1 at 128).

8. Petitioner testified that whenever there was a disagreement on how to fix a problem, Mr. Warburton had the final say. For example, Mr. Warburton instructed him to use particle board to fix a damaged floor, rather than plywood as Petitioner had suggested. Mr. Warburton told Petitioner to fill a pothole with concrete rather than asphalt as Petitioner had suggested. Mr. Warburton told Petitioner how to fix some down spouts outside the building. Mr. Warburton told Petitioner to use trash bags rather than a trash can. (R. 3 at 24-25, 31-32, 34, 43-44). Mr. Warburton stated he did not recall a disagreement over a pothole, though he stated he remembered Petitioner fixing one. He stated he did not recall a disagreement over using trash cans or bags. (R. 3 at 118).

9. Petitioner testified that there were several times when Mr. Warburton interrupted him while he was working and asked him to do another task, such as inspecting a furnace or fixing a broken toilet handle. (R. 3 at 25).

10. Petitioner testified that on one occasion when he received a request from a tenant to fix a broken cabinet hinge, he called Mr. Warburton for instructions, and was told not to fix it. (R. 3 at 26).

11. Petitioner testified that Mr. Warburton hired some painters and told Petitioner to go to Home Depot and buy supplies for the painters and to supervise them. Mr. Warburton introduced Petitioner to the painters as the "Job Foreman." (R. 3 at 30). Mr. Warburton denied this, stating that he did not think anybody supervised the painters and that he thought he bought all the paint for the project

himself. He stated that he did not hire Petitioner as a Job Foreman (R. 3 at 115, 132, 136).

12. Petitioner testified that Mr. Warburton came by the work site for the most part every couple of days or so. (R. 3 at 26). The Labor Commission found that Mr. Warburton specifically visited the site on November 27, 2005, and was upset over the progress on the units. Mr. Warburton was subsequently out of town for about a week and was bedridden with pneumonia for ten days. After this, Mr. Warburton visited the job site once a week until December 23rd, 2005. (R. 1 at 186).

13. Petitioner testified that during the last couple of weeks that he worked for Respondent, that Respondent Van Adams personally took control over the project. He gave Petitioner time limits on completing certain projects, such as four hour limits each on fixing plaster in the stairways and power washing the building. (R. 3 at 28). Respondent also instructed Petitioner on how to do his work, telling him to fix a hot water heater by replacing the washers rather than using a steel braided hose as Petitioner suggested, and telling Petitioner to focus his efforts on the outside of the building rather than the inside. If Respondent's instructions conflicted with Mr. Warburton's instructions, Petitioner assumed that Respondent's instructions prevailed. (R. 3 at 45-47). Respondent denied that he or Mr. Warburton in any way supervised Petitioner. (R. 3 at 181).

14. The Labor Commission found that on December 6, 2005, Respondent paid Petitioner $4,000.00 and told him to wrap up the project, which was still

incomplete at that time. (R. 1 at 186).

15. Respondent sent Petitioner a Form 1099 as tax documentation for all sums paid to him. The IRS, however, subsequently determined that Petitioner was an employee and required a W-2, with appropriate deductions for Federal and State Taxes and other required withholdings. (R. 1 at 123, R. 3 at 52, 147-148).

16. At some point, the exact date of which was disputed, Petitioner and Respondent had a "falling out." Petitioner testified that the dispute was because Respondent owed him money for work he had done on the apartments. (R. 3 at 72-73). Respondent testified that he had paid Petitioner enough for what he called "shoddy workmanship" and that Petitioner was "out of control." (R. 3 at 171-172).

17. The Labor Commission found that on December 23rd, 2005, Petitioner requested an additional $9,800.00 for services and supplies he had provided. Respondent refused to pay and ordered Petitioner to leave the premises. (R. 1 at 186). Petitioner however testified that the "falling out" occurred shortly before or shortly after New Year's Day, 2006. (R. 3 at 72-73).

18. On January 10, 2006 Respondent requested that Petitioner complete a spreadsheet to account for how much time he worked, traveled and spent. Respondent declined to pay for the additional time such an itemized accounting would require and it was thus never provided. (R. 1 at 118-119, 128; also R. 3 at 99, 185).

19. At Respondent's instruction, Petitioner had been using an industrial

wheel barrow designed air compressor in order to sand blast the outside of the building. The air compressor weighed about 300-350 lbs. (R. 3 at 7, 8).

20. On December 26, 2005, Petitioner and his helper named Max came to the job site to pick up the air compressor. Petitioner and Max lifted the air compressor a little less than three feet from the ground onto the truck bed. Petitioner lifted one end of the air compressor or one-half of the weight of the machine. Petitioner testified that he twisted his torso when he lifted the machine. He experienced almost immediate pain in his lumbar spine. After the accident, Petitioner did not return to work at either the rental property or anywhere else. (R. 1 at 129; see also R. 3 at 7-10).

21. After his injury, Petitioner tried to contact Mr. Van Adams and Mr. Warburton several times by telephone and e-mail, but he never received any response for either of them. (R. 3 at 10, 11).

22. On January 27, 2006 Petitioner was seen by Dr. Frederic Civish for a physical and complained of rapidly increasing back pain. (R. 2 at 6-9).

23. On February 24, 2006, Dr. Civish completed a Summary of Medical Record. Dr. Civish opined a medical nexus between Petitioner's accident on December 26, 2005 and Petitioner's physical complaints. He stated that Petitioner's injury was new and not an aggravation of a preexisting condition and recommended that future treatment of Petitioner would be medication and possible physical therapy. (R. 2 at 4, 5).

24. On June 15, 2006, Dr. Joel Dall conducted an Independent Medical Evaluation (IME) of Petitioner, at Respondent's request. Dr. Dall opined that Petitioner presented symptoms of lumbar strain that were causally related to the accident on December 26, 2005. Dr. Dall further opined that Petitioner was not medically stable and he required treatment. Dr. Dall recommended that future medical treatment of Petitioner's condition could include physical therapy and a consultation with a psychiatrist. (R. 2 at 10-15).

25. On August 11, 2006, Dr. Civish extended Petitioner's disability period from December 26, 2005 to September 1, 2006. Dr. Civish released Petitioner to light duty work with a permanent restriction to perform no physical labor. However, no light duty work was offered to Petitioner. (R. 2 at 1).

26. On August 11, 2006, Dr. Civish completed another Summary of Medical Record wherein he opined that Petitioner cannot do any job involving lifting, bending, or pushing and that he had a permanent impairment of less than 5%. (R. 2 at 2).

27. At the time of his injury, Petitioner was not married and he did not have any depended children. Petitioner's weekly compensation rate was $609.00, the maximum rate. (R. 1 at 127).

28. There was no evidence that Respondent Van Adams was insolvent or unable to pay workers compensation benefits to Petitioner. Uninsured Employers Fund (UEF) had no liability at the time of the Hearing with respect to any benefits which may be owed to Petitioner. (R. 1 at 130).

29. Following an evidentiary Hearing, Administrative Law Judge Lorrie Lima entered Findings of Fact, Conclusions of Law and Order on January 2, 2006, finding that although Petitioner was an employee of Respondent Harold Van Adams and that he had suffered an injury on the work site, the injury had occurred after he had been discharged and thus was not compensable. She dismissed all of Petitioner's claims. (R. 1 at 126-132, a copy of said Order is attached hereto as Addendum "A").

31. The Utah Labor Commission entered its Order Amending ALJ's Decision and Affirming Denial of Benefits on August 28th, 2009, adopting Judge Lima's Findings of Fact. (R. 1 at 185-189, a copy of said Order is attached hereto as Addendum "B").

SUMMARY OF ARGUMENT

Petitioner was an employee of Respondent Harold Van Adams. Petitioner meets both the statutory definition of an employee contained in the Utah Workers' Compensation Act, as well as the common law requirements of "supervision or control." Respondent exercised sufficient control over Petitioner's work activities so as to legally make him an employee regardless of how Respondents otherwise characterized the parties relationship.

Although Petitioner's workplace injury occurred after the date Respondents alleged he had been terminated he is nonetheless entitled to workers' compensation benefits as his activities on that date fell within the scope of his employment.

ARGUMENT

I

PETITIONER WAS AN EMPLOYEE AND NOT AN INDEPENDENT CONTRACTOR AT THE TIME OF HIS WORKPLACE INJURY.

The threshold question is whether Petitioner functioned as an independent contractor or an employee of Respondent Harold Van Adams. The Workers' Compensation Act (the "Act") at § 34A-2-401 (2005) requires employers to provide workers' compensation insurance coverage to employees.

The Act fleshes out the definitions of "employer" and "employee" in § 34A-2-104(1)(b) (2003) were "employee" is defined as:

> (b) a person in the service of any employer, as defined in Section 34A-2-103, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment:
> (I) under any contract of hire:
> (A) express or implied; and
> (B) oral or written;
> (ii) including aliens and minors, whether legally or illegally working for hire; and
> (iii) not including any person whose employment:
> (A) is casual; and
> (B) not in the usual course of the trade, business, or occupation of the employee's employer.

The Act in § 34A-2-103(2)(a) defines "Independent Contractor" as:

> "Independent contractor" means any person engaged in the performance of any work for another who, while so engaged, is:
> (i) independent of the employer in all that pertains to the execution of the work;
> (ii) not subject to the routine rule or control of

> the employer;
>
> (iii) engaged only in the performance of a definite job or piece of work; and,
>
> (iv) subordinate to the employer only in effecting a result in accordance with the employer's design.

The question of whether one is an employee or an independent contractor has been before the Utah Appellate Courts since 1912, beginning with the case of Callahan v. Salt Lake City, 41 Utah 300, 125 P. 863 (1912). More recently, the Utah Supreme Court in Rustler Lodge v. Industrial Commission, 562 P.2d 227 (Utah 1977) stated that:

> The determination of the status of an employee is based on various factors and of primary concern is the control, direction, supervision and the *right* to control, direct or supervise on behalf of the employer. When the employer retains supervision and control of the work to be performed, the workmen are employees. (Emphasis added).

Id. at 228.

In Averett v. Grange, 909 P.2d 246, 249 (Utah 1995) the Utah Supreme Court held that: "In workers' compensation cases, this court has consistently held that whether an employer-employee relationship exists depends upon the employer's right to control the employee." Citing Pinter Construction Co. v. Frisby, 678 P.2d 305 (Utah 1984) the Court clarified that "It is not the actual exercise of control that determines whether an employer-employee relationship exists; it is the right to control that is determinative." Id. at 309.

In Mitchell v. Rice, 885 P.2d 820 (Utah App. 1994) this Court held that in determining whether a worker is an independent contractor or an employee that:

> We look primarily to the following factors: (1) whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment, i.e., whether in wages or fees, as compared to payment for a complete job or project; and (4) the furnishing of the equipment. (citations omitted). *Id.* at 821.

The application of the above principles of law invariably leads to the legal conclusion reached by Administrative Law Judge Lima that Petitioner was an employee of Respondent Harold Van Adams.

A. Direct Evidence of Right of Control.

Petitioner testified that his job was essentially to do whatever Respondent Van Adams or his agent Mark Warburton told him to do. "They [Van Adams and Warburton] gave me lots of different assignments and I just did whatever they wanted, if I had the ability to do it." (R. 3 at 4).

The ALJ made the Finding of Fact that Mr. Warburton was frequently on the job site and expressed his dissatisfaction with what he regarded as the lack of work accomplished on the rental units. (R. 1 at 127). The record is replete with examples of the control that Mr. Warburton and Respondent exercised. The ALJ found that Respondent's agent, Mr. Warburton, instructed Petitioner to among other things; board up windows, change locks, replace thermostats, repair drywall, a pothole, a gutter spout and a toilet handle, tear out carpeting, determine where leaks occurred

and purchase cleaning supplies and paint. On one occasion Petitioner even showed a rental unit to a prospective tenant at Mr. Warburton's direction. He hired painters and other helpers at Mr. Warburton's request. (R. 1 at 126-131). These Findings of Fact were adopted by the Labor Commission. (R. 1 at 185).

Petitioner testified that whenever there was any disagreement on how to fix a problem that Mr. Warburton had the final say and that he frequently overruled Petitioner and gave specific instruction on how he wanted repairs done. (R. 3 at 24-25, 31-32, 34, 43-44).

The Petitioner further testified that during the last couple of weeks that he worked for Respondent, that Mr. Van Adams personally took control over the project. He gave Petitioner time limits on completing certain projects and specific directions on how he was to do certain repairs. (R. 3 at 28, 45-47).

B. Right to Hire and Fire.

Petitioner did not have the authority on his own initiative to hire others to assist him. Mr. Warburton, however did on occasion direct him to hire others to assist him and instructed Petitioner on how much and how often to pay those workers. (R.3 at 18-19, 21). Mr. Warburton testified that Petitioner did not have the authority to hire others and that he [Warburton] hired the painters and others. (R. 3 at 115, 132, 136). It is undisputed that Petitioner did not have the authority to fire any of the so called "helpers."

In Ludlow v. Industrial Commission, 65 Utah 168, 235 P.884 (1928), Mr.

Justice Thurman, speaking for the Court noted: "An independent contractor can employ others to do the work and accomplish the contemplated result without the consent of the contractee, while an employee can not substitute another in his place without the consent of the employer." *Id* at 888.

It is also undisputed that Petitioner himself was ultimately fired by Respondents. Professor Larson in his treatise on Workers' Compensation Law comments on the legal significance of such a termination:

> The power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract.

Larson's Workers' Compensation, § 61.08 [1] (11/02).

C. The Method of Payment.

In English v. Kienke, 848 P.2d 153,157 (Utah 1993) the Utah Supreme Court elaborated on the significance of the method of payment.

> Speaking in generality: an employee is one who is hired and paid a salary, a wage or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his [or her] own way, subject to only minimal restrictions or controls and is responsible only for its satisfactory completion.

Although the projected budget for the Holden Street repairs was $1500.00, including Petitioner's labor and supplies, Mr. Warburton agreed to pay Petitioner at the hourly rate of $40.00 per hour. He was told to keep track of his hours and the cost of his supplies. (R. 3 at 14-17; R. 1 at 76-115). The Labor Commission in its Order states that although Petitioner testified that he was to be paid hourly that they "find the other testimony more credible." (R1 at 186, including footnote 1). The Commission however never specifies what that "other testimony" was, but presumably it was the alleged $1500.00 budget for the needed repairs.

The allegation that Petitioner was to be paid only a set sum is belayed by the clear documentary evidence that he kept time sheets and receipts. The Labor Commission makes a contradictory Finding of Fact that "On December 6, 2005, Mr. Warburton and Mr. Van Adams paid Mr. Norton $4,000.00 and then surveyed the project, which was still incomplete." (R. 1 at 186, see also Labor Commission Order a copy of which is attached hereto as Addendum B). This is entirely inconsistent with the Labor Commission's Finding that only $1,500.00 was to be paid to Petitioner for the entire job.

Indeed, the Labor Commission goes on to indicated that on December 23, 2005, Petitioner requested an additional $9, 800.00 for services rendered. It was at that point he was terminated and ordered off the rental property. (R. 1 at 186). Although the Labor Commission adopted the ALJ's Findings of Fact, it simply ignored them in significant part and relied on unspecified "other testimony" as more

credible, even though such testimony, if it even exists, is at odds with the specific Facts recited by the Commission in its Order.

The ALJ found the Petitioner to be an employee. The Labor Commission adopted the same Findings of Fact, but reached a different legal Conclusion. While such a result is possible, it is required that the Commission engage in adequate Fact Finding to support its legal conclusions.

In reviewing the factual findings of an administrative agencies the appellate Court reviews the "whole record" before the court and considers not only the evidence supporting the Agencies factual findings, but also the evidence that "fairly detracts from the weight of the [Commission's] evidence." The agency's findings of fact will be affirmed only if they are "supported by substantial evidence." Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Utah Ct. App. 1989). *See also*, Nyrehn v. Industrial Commission, 800 P.2d 330, 335 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991).

The Labor Commission's Conclusion that the Petitioner was not an employee is not supported by "substantial evidence" or even the preponderance of the evidence which it specifically found.

Finally, although not legally binding, it is of some evidentiary value that Respondents attempted to pay Petitioner pursuant to a Federal Tax Form 1099, which typically would be used for an independent contractor. The IRS however disallowed the 1099 and required Respondents to issue instead a W-2 Form, with

appropriate deductions. (R. 1 at 123, R. 3 at 52, 147-148). Thus, the United States government made an official determination that Petitioner was an employee and not an independent contractor.

D. The Furnishing of Equipment.

The ALJ specifically found (and the Labor Commission adopted that Finding) that the Petitioner used his own tools and truck to repair the rental units. They were to be stored in a garage located on the rental property "per Mr. Warburton's request.." Respondent purchased paint and cleaning supplies for Petitioner to use and also provided a trailer so Petitioner could haul garbage away. Petitioner was instructed to buy other required supplies and to keep receipts so he could be reimbursed. (R. 1 at 127-128).

The ALJ made a specific finding that Petitioner worked for Respondent as an employee with respect to the repair work on the rental property in Midvale, Utah. (R. 1 at 131, see also Addendum "A").

When one views the totality of the evidence, specifically focusing on the element of control as indicated in the above four areas, the evidence is overwhelming that Petitioner was an employee and not an independent contractor.

II

PETITIONER WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WHEN HE SUFFERED A COMPENSABLE WORKPLACE INJURY.

A. Injury Arising Out of And in The Course of Employment.

Utah Code Annotated, Section 34A-2-401 provides for specified workers

compensation benefits for injuries "... by accident arising out of and in the course of employment.

The ALJ devoted only a single paragraph to the discussion of this issue, although it served as the sole and exclusive basis for her denial of any and all workers compensation benefits to the Petitioner. In rendering her decision on this point, the ALJ cited no case law or statutory support. The sole basis for her determination on this point was her conclusion that:

> Petitioner's accident and related medical condition occurred on December 26, 2005, after the employment relationship was severed by Respondent. Accordingly, Petitioner did not sustain an injury within the time and space boundaries of the employment and in the course of an activity whose purpose was related to his employment with Respondent. (R.1 at 131, see also copy attached hereto as Addendum "A").

The Labor Commission paid even less attention to this pivotal issue, relegating it to two short sentences in a footnote as follows: "The Commission notes that regardless of whether Mr. Norris had proven he was an employee of Mr. Van Adams, the employment relationship had ended at the time of the accident. Thus, Mr. Norris would still not have been entitled to workers' compensation benefits." (R.1 at 187, see also Addendum "B" hereto). No other analysis on this point is provided by the Commission.

In reviewing the factual findings of an administrative agencies the appellate Court reviews the "whole record" before the court and considers not only the evidence supporting the Agencies factual findings, but also the evidence that "fairly

detracts from the weight of the [Commission's] evidence." The agency's findings of fact will be affirmed only if they are "supported by substantial evidence." Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Utah Ct. App. 1989).

As noted above, there is significant dispute as to when the employment relationship was severed. Although Respondent testified that it occurred on December 23, 2005, that testimony is inherently self serving. It is extremely convenient, and suspect, that Respondent claims to have terminated his employment relationship with Petitioner just shortly before Petitioner is injured on the job.

In fact, there is no independent documentary evidence to show that Petitioner's employment was terminated on December 23, 2005, as alleged by Respondent. Petitioner acknowledged that the parties had a falling out, but testified that he was not terminated until approximately New Years Day, 2005. Petitioner's testimony is support by the fact that he continued to perform work for Respondent after December 23rd, when he was allegedly terminated.

In particular, Petitioner had worked for approximately three hours at the Holden Street job site on December 26th before he was injured. Respondent's testimony that Petitioner had been discharged on December 23rd and had "taken his tools and left" is disproved by the undisputed fact that Petitioner was injured on December 26th while removing his air compressor from the work site. There was no

dispute that the Petitioner was injured on that date and on Respondent's property while loading his work tools in his truck.

B. Liability For Workers Compensation Benefits Can Extend for a Reasonable Period Past the Exact Time of Termination.

Even if one was to assume that Petitioner was discharged on December 23, 2005, some three days before his industrial injury, that alone would not defeat his entitlement to workers compensation benefits.

Professor Larson in his well acknowledged treatise on Workman's Compensation Law states as follows:

> Compensation coverage is not automatically and instantaneously terminated by the firing or quitting of the employee. The employee is deemed to be within the course of employment for a reasonable period while winding up his or her affairs and leaving the premises.
>
> * * * * * *
>
> ... [T]he allowed interval should be long enough to encompass the incidents that flow directly from the employment, although they may take effect after employment has technically ceased. Larson's Workers's Compensation Law, Section 26.01 (Rel. 94-07/05).

Although there is no Utah case law directly on point, the law from other jurisdictions is replete with authority for the extension of workers compensation coverage past the exact time of termination. For example, coverage has been held to extend through a lunch period after discharge. Nicholson v. Industrial Commission, 76 Ariz. 105, 259 P.2d 547 (1953). Workers' compensation coverage has also been required for injuries sustained when, following termination the former employee returns to the worksite to collect his or her final pay, even when that

occurs days later. St. Anthony Hospital v. James, 889 P.2d 1279 (Okla. Ct. App. 1994).

Professor Larson noted, "Collecting one's personal effects on leaving employment is logically no different from collecting one's pay, since both are necessary incidents of an orderly termination of the employment relation". Larson's Workers' Compensation Law, § 26.04 (Rel. 94-06/05).

In Herman v. Sherwood Industries, Inc., 244 Conn. 502, 710 A.2d 1338 (1998), a case remarkable similar to the facts of this case, the claimant was discharged and was told to retrieve his tools from the loading dock. When he lifted the tools, he injured his back. As these tools were kept on the employer's premises for the benefit of both the claimant and employer, and as it was at the employer's suggestion that the claimant retrieved his tools, the accident was held to have occurred during an activity that was incidental to employment and was covered.

In Nails v. Market Tire Co., Inc., 29 Md. App. 154, 347 A.2d 564 (1975) a discharged employee alleged that he injured his back while lifting his tools he had returned to retrieve two days after being fired. The Maryland Court found that his injury arose in the course of his employment.

In this case, it should be noted that December 23rd, the date Respondent alleges Petitioner was terminated was a Friday. The time of day of the alleged discharge was not testified to. Even if one were to resolve the conflict in the evidence as to the date of termination in favor of the Respondent, it must be

recognized that the following day; a Saturday, was Christmas Eve and the day after that was Christmas. Due to the size and weight of the air compressor, Petitioner needed help loading it and it is only reasonable that he would have to return latter with the needed help. No one disputes that his injury occurred on Monday, December 26th, is a very short and reasonable time after the alleged discharge, especially in light of the intervening holidays.

Petitioner's injuries occurred on Respondent's property, while Petitioner was retrieving his work tools. There was evidence that Petitioner was still employed on that date and had been rendering services for the Respondent, his employer. Even if the injury occurred "post termination," he would still be entitled to workers compensation coverage because he was injured during "a necessary incident of an orderly termination of the employment relationship."

III

THE WORKERS COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS AS TO COVERAGE ARE TO BE RESOLVED IN FAVOR OF THE INJURED WORKER.

Few principles of workers compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990);

J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977); Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askren v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra, first discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

> [O]ur statute requires that the statues of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.
>
> * * * * * *
>
> The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. Id. at 1021-1022. (Emphasis added).

Whenever any doubt or uncertainty appears in the record, it must be resolved in favor of the injured worker and the awarding of benefits. The Act is to be construed in favor of protecting the employee.

The Labor Commission in its Order failed to properly apply this vital rule of construction. Its Findings and Conclusions do not evidence a "liberal construction" and "resolution of doubt in favor of the claim."

CONCLUSION/STATEMENT OF RELIEF SOUGHT

For the reasons above cited, Petitioner respectfully requests that the Court of Appeals reverse the Labor Commission and direct that the case be remanded to the Administrative Law Judge for the entry of an award of benefits.

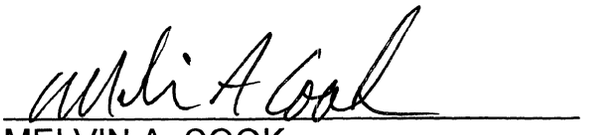
DATED this 4th day of February, 2010.

Melvin A. Cook
Counsel for Petitioner, Richard Norris

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2010, a copy of the foregoing BRIEF OF PETITIONER RICHARD NORRIS was hand-delivered and/or mailed, as follows:

UTAH COURT OF APPEALS 450 South State Street - 5TH Floor P.O. Box 140230 Salt Lake City, Utah 84111-0230	(1) original and (7) copies
Mr. Alan L. Hennebold UTAH LABOR COMMISSION Post Office Box 146600 Salt Lake City, Utah 84114-6600	(2 copies)
Ms. Nancy L. Kemp Assistant Attorney General 160 East 300 South, Fifth Floor P.O. Box 140858 Salt Lake City, UT 84114-0858	(2 copies)
Mr. Harold Van Adams 5293 E. Elkhorn Circle Eden, UT 84101	(1 copy)
Mr. Richard Norris 779 E 9400 S. #302 Sandy, UT 84094	(1 copy)
File Copies	(2 copies)



MELVIN A. COOK
Counsel for Richard Norris

Addendum A

Findings of Fact, Conclusions of Law and Order

Administrative Law Judge Lorrie Lima

(January 2, 2007)

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

RICHARD NORRIS, **Petitioner,** **vs.** **HAROLD VAN ADAMS and/or UNINSURED EMPLOYERS FUND,** **Respondent.**	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** **Case No. 06-0127** **Judge Lorrie Lima**

HEARING: Room 336, Utah Labor Commission, 160 East 300 South, Salt Lake City, Utah, on September 26, 2006, at 1:00 p.m. The hearing was pursuant to Order and Notice of the Commission.

BEFORE: Lorrie Lima, Administrative Law Judge.

APPEARANCES: The petitioner, Richard Norris, was present and represented by Melvin A. Cook, Esq.

The respondent, Harold Van Adams, was present and represented himself.

The respondent, Uninsured Employers Fund, was represented by Sharon J. Eblen, Esq.

STATEMENT OF THE CASE AND CASE PROCEEDINGS

On February 9, 2006, Richard Norris (Petitioner) filed an Application for Hearing and claimed the following workers compensation benefits: Medical expenses and temporary total disability compensation. Petitioner asserted that he sustained an industrial accident on December 26, 2005.

On March 3, 2006, a Notice of Formal Adjudicative Proceedings and Order for Answer was issued by the Utah Labor Commission (Commission).

On March 31, 2006, Harold Van Adams (Respondent) filed an Answer and denied that he and Petitioner had an employment relationship.

On April 3, 2006, the Uninsured Employers Fund (UEF) filed an Answer and asserted that Petitioner was an independent contractor and that his accident did not occur in the course and scope of his employment as he did not have an employment relationship with Respondent.

At the hearing, Petitioner's Motion to Compel filed on September 15, 2006, was denied for failure to follow Utah Administrative Code, Rule 602-2-1.F. Petitioner's Motion to Continue the hearing was denied.

At the hearing, Petitioner amended his claim for workers compensation benefits to include recommended medical expenses, temporary partial disability compensation, permanent partial disability compensation and travel expenses.

FINDINGS OF FACT

1. Employment and Compensation.

A. Wage.

On December 6, 2005, Respondent paid, or had already paid, to Petitioner a total of approximately $4,500. Petitioner was not married and he did not have any dependent children. Petitioner's weekly compensation rage was $609.00, the maximum rate.

B. Employment Agreement.

On or about November 22, 2005, Petitioner and Mark Warburton[1] agreed that Petitioner would fix up three vacant vandalized rental units in Midvale, Utah. The rental property, eight apartments and one duplex, were owned by Respondent. Mr. Warburton informed Petitioner that the budget for fixing up[2] the apartments was $1,500.00 which included Petitioner's wage and services and supplies. Petitioner informed Mr. Warburton that he could complete the repairs in three to four days. At that time, Mr. Warburton gave Petitioner approximately $600.00 in cash. Mr. Warburton requested that Petitioner keep a record of the hours he worked on the apartments and copies of any receipts of materials that he purchased to repair the rental units.

The Sunday following Thanksgiving, Mr. Warburton visited the rental units. Mr. Warburton was upset about what he opined was the lack of work accomplished on the units. At that time, Petitioner turned in the time that he had spent working on the units and receipts for supplies that he had purchased. Mr. Warburton noted that Petitioner's calculations exceeded the budgeted amount of $1,500.00. Mr. Warburton informed Petitioner that he did not expect Petitioner to perform a "Class A" job but to finish the work so that the units could be rented.

[1] Mr. Warburton collected monthly rent from the tenants for Respondent. Respondent paid to Mr. Warburton a percentage of the rent that he collected. Mr. Warburton was also the contact person if a tenant needed a repair. In response to a tenant's complaint, Mr. Warburton would contact a repairman to perform the repair service.
[2] "Fixing up" the rental units consisted of removing garbage, raking leaves, cleaning and repairing holes in walls, patching holes, painting and a sand job.

Petitioner used his own truck and tools to repair the rental units. Mr. Warburton provided a trailer to Petitioner to haul garbage away. On Mr. Warburton's instruction or consent, Petitioner boarded up windows, changed locks, replaced thermostats, repaired drywall, a pothole, a gutter spout and a toilet handle, boarded up windows, tore out carpeting, determined where leaks occurred and purchased cheap cleaning supplies and paint. Petitioner used his own tools and stored them in a garage located on the rental property per Mr. Warburton's request. Mr. Warburton informed Petitioner that there were some cleaning supplies already purchased by Respondent and stored in the garage which Petitioner could use. Petitioner showed a rental unit to a prospective tenant and Mr. Warburton gave Petitioner a rental application for the tenant to complete.

On or about December 1, 2005, Mr. Warburton left town for a training program and returned approximately one week later. Petitioner gave to Mr. Warburton a summary of his work time and receipts for supplies which totaled approximately $4,500.00. Mr. Warburton gave the summary to Respondent.

On or about December 6, 2005, Mr. Warburton and Respondent met with Petitioner. Respondent issued a check to Petitioner for approximately $4,000.00. Petitioner, Respondent and Mr. Warburton walked around the rental units to look at Petitioner's projects. Respondent was dissatisfied that the work was not completed. Respondent told Petitioner to wrap up the job. Petitioner informed Respondent that he would finish the repair work in one day.

After December 6, 2005, Mr. Warburton developed pneumonia for 10 days and he did not visit the rental property. Respondent visited the rental property once a week and he continued to see Petitioner on the rental property although he did not know why he was there.

On December 23, 2005, Respondent visited the rental property. Petitioner asked Respondent to pay him an additional $9,800.00 for completed work. In response, Respondent informed Petitioner that he had already paid him for shoddy workmanship. Respondent further informed Petitioner that he was "out of control." Petitioner continued to ask Respondent for payment and threatened him physically. Respondent ordered Petitioner off of his rental property. Petitioner collected his tools and left the rental property.

Petitioner filed a mechanic's lien against Respondent for his repairs, materials and work services for a total of $8,907.32. On January 10, 2006, Respondent requested that Petitioner complete a spreadsheet to account for how much time he worked, traveled and spent. In response, Petitioner informed Respondent that if he wanted such an accounting he would charge $40.00 an hour. Petitioner did not provide an accounting to Respondent. On January 26, 2006, Petitioner issued correspondence to Mr. Warburton and notified him that he intended to file a civil lawsuit against him and make a report to the US Immigration and Naturalization Services. On February 13, 2006, Petitioner issued correspondence to Respondent and informed him of his injury and threatened to file a lawsuit against him.

2. Accident and Medical Treatment.

On December 26, 2005, Petitioner and a third party lifted an industrial, wheelbarrow designed air compressor into Petitioner's truck bed. The weight of the air compressor was 300 to 350 pounds. Petitioner and the third party lifted the air compressor a little less than three feet from the ground into the truck bed. Petitioner lifted one end of the air compressor or one-half the weight of the machine. Petitioner testified that he could have twisted his torso when he lifted the machine. He experienced pain in his lumbar spine. Petitioner did not seek medical treatment at that time. Following the accident, Petitioner did not return to work at either the rental property or anywhere else.

Petitioner tried to contact Respondent and Mr. Warburton several times but he did not receive a response. Around the first part of January 2006, Mr. Warburton contacted Petitioner.

On January 27, 2006, Petitioner was seen by Dr. Frederic Civish for a physical and complaints of rapidly increasing back pain. Medical Records Exhibit (MRE), 6. Dr. Civish's assessment was hypertension, insomnia, rectal bleeding and erectile dysfunction. MRE, 8. Dr. Civish referred Petitioner for a chest x-ray and colonoscopy.

On February 24, 2006, Dr. Civish completed a Summary of Medical Record. MRE, 4. Dr. Civish opined a medical nexus between Petitioner's accident on December 26, 2005, and Petitioner's problems. Dr. Civish determined that Petitioner was released to usual work on February 28, 2006, although he stated that Petitioner was required to be off work to March 1, 2006. Dr. Civish opined that Petitioner's injury did not aggravate a preexisting condition. He recommended that future treatment of Petitioner would be medication and possibly physical therapy.

On March 17, 2006, Dr. Civish completed a Summary of Medical Record. MRE, 3. Dr. Civish determined that Petitioner was required to be off work from December 26, 2005, to January 25, 2006, and he did not have a permanent injury. Dr. Civish added medication to his February 2005, recommendations for future treatment of Petitioner's condition.

On June 15, 2006, Dr. Joel Dall conducted an independent medical evaluation of Petitioner. MRE, 10. Dr. Dall opined that Petitioner's present symptoms, lumbar strain, were causally related to the accident on December 26, 2005. Dr. Dall further opined that Petitioner was not medically stable and he required treatment. Dr. Dall recommended that future medical treatment of Petitioner's condition could include physical therapy and a consultation with a physiatrist.

On August 11, 2006, Dr. Civish extended Petitioner's disability period from December 26, 2005, to September 1, 2006. MRE, 1. Dr. Civish released Petitioner to return to light duty work with a permanent restriction to perform no physical labor.

Currently, Petitioner experiences back pain from time to time when he stands or drives a care. He takes an over-the-counter pain medication, ibuprofren, daily.

3. Liability of the Uninsured Employers' Fund

None of the parties introduced any evidence that Respondent stood insolvent or unable to pay any workers compensation benefits to Petitioner. Therefore, the UEF incurred no liability at this time with respect to any workers compensation benefits owed to Petitioner.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A-2-401 of the Utah Workers Compensation Act provides various medical and disability benefits for the workers "injured . . . by accident arising out of and in the course of employment . . .." Thus, in order to receive benefits for an injury, a claimant must meet each of the Act's three threshold requirements: (1) The injury was accidental, (2) the injury arose out of employment, and (3) the injury arose in the course of employment.

1. Employment Relationship.

The Utah Supreme Court held that:

> [i]t will almost always follow that if the evidence shows that an "employer" retains the right to control the work of the claimant, the claimant is the employer's employee for workmen's compensation purposes (citations omitted). Certainly the concept of right to control is not to be rigidly and narrowly defined. Rather it should be defined to give full effect to the remedial purpose of the Workmen's Compensation Act. (citations omitted).
>
> * * * *
>
> Many factors have been applied in determining the right to control. Among those factors are actual supervision of the worker, the extent of the supervision, the method of payment, the furnishing of equipment for the worker, and the right to terminate the worker. (citations omitted). Although these factors are not inclusive, they are relevant in many cases. . .. *Bennett v. Industrial Commission of Utah*, 726 P.2d 427 (Utah 1986).

Petitioner worked for Respondent as an employee with respect to the repair work on the rental property in Midvale, Utah. Mr. Warburton, as an agent of Respondent, hired Petitioner an employee. Mr. Warburton provided Petitioner with specific directions and some supplies, with instructions to buy other inexpensive supplies, in order to perform the repair work. Mr. Warburton provided a trailer to Petitioner to haul away garbage and he instructed Petitioner to store his tools in a building located on the rental property. Although Mr. Warburton was not present on the rental property on a frequent basis when Petitioner initially began the repair work, he and Respondent inspected Petitioner's work often enough to conclude that they were dissatisfied with the how long Petitioner took to complete the projects. Furthermore, Respondent also determined that Petitioner's work was shoddy. Respondent paid Petitioner the original

agreed upon amount of $1,500.00 plus approximately $3,000.00 more. Finally, Respondent terminated Petitioner and ordered him off of the rental property.

2. In The Course Of Employment.

On December 23, 2005, Respondent refused to pay Petitioner's request for additional payment of $9,800.00, and told him that his services were no longer required on the rental property. Respondent ordered Petitioner of the rental property. In response, Petitioner collected his truck and tools from the property and left. On the basis of those facts, Respondent terminated the employment relationship with Petitioner on that day. Petitioner's accident and related medical condition occurred on December 26, 2005, after the employment relationship was severed by Respondent. Accordingly, Petitioner did not sustain an injury within the time and space boundaries of the employment and in the course of an activity whose purpose was related to his employment with Respondent.

ORDER

IT IS HEREBY ORDERED that Petitioner's claims for medical expenses, recommended medical care, temporary total disability compensation, temporary partial disability compensation, permanent partial disability compensation and travel expenses are dismissed with prejudice.

DATED this 2nd day of January, 2007.

Lorrie Lima
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order, was mailed by prepaid U.S. postage on January 2, 2007, to the persons/parties at the following addresses:

Melvin A Cook Esq
139 E S Temple Ste 300
Salt Lake City UT 84101

Harold Van Adams
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Eden UT 84310

Sharon J Eblen Esq
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Salt Lake City UT 84111

UTAH LABOR COMMISSION
Rosalee Dickson
Clerk, Adjudication Division
PO Box 146615
Salt Lake City, UT 84114-6615

Addendum B

Order Amending ALJ's Decision and Affirming Denial of Benefits

Utah Labor Commission

(August 28, 2009)

UTAH LABOR COMMISSION

RICHARD NORRIS, **Petitioner,** **vs.** **HAROLD VAN ADAMS and/or UNINSURED EMPLOYERS FUND,** **Respondent.**	**ORDER AMENDING ALJ'S DECISION and AFFIRMING DENIAL OF BENEFITS** **Case No. 06-0127**

Richard Norris asks the Utah Labor Commission to review Administrative Law Judge Lima's denial of benefits to Mr. Norris under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Norris claims workers' compensation benefits from Harold Van Adams and the Uninsured Employers Fund ("UEF") for a back injury that allegedly occurred on December 26, 2005. Judge Lima held an evidentiary hearing and found Mr. Norris was an employee of Mr. Van Adams but at the time of the accident, Mr. Norris was no longer an employee. Therefore Judge Lima denied benefits.

In his motion for review Mr. Norris argues that he was Mr. Van Adams' employee at the time of the accident and entitled to benefits. He further argues that it was error for Judge Lima to dismiss his claim with prejudice. Mr. Van Adams and the UEF argue that Mr. Norris was hired as an independent contractor and was never an employee. They further argue that even if the Commission found Mr. Norris was Mr. Van Adams' employee, this relationship ended on December 23, 2005. Therefore Mr. Norris's injury of December 26, 2005, did not arise out of and in the course of his employment and is not compensable.

FINDINGS OF FACT

The Commission adopts Judge Lima's findings of facts. The facts relevant to the issues in the motion for review can be summarized as follows:

On November 22, 2005, Mr. Warburton, Mr. Van Adams' agent, offered to pay Mr. Norris $1,500 to "fix up" three vacant and vandalized apartments. This amount included labor and

supplies.[1] The project required Mr. Norris to repair drywall, plumbing, furnaces, and perform sandblasting. Mr. Norris was given $600 initially and was asked to keep a record of the hours he worked and copies of any receipts for materials he purchased. Mr. Norris began working on the apartments using his own truck and tools, including his air compressor for sandblasting. Some cleaning supplies were already available, as was a trailer for hauling away waste, and Mr. Warburton instructed Mr. Norton that he could use these.

On November 27, 2005, Mr. Warburton visited the apartments and was upset by the lack of progress on the units. Mr. Norris also provided Mr. Warburton receipts for work and material that exceeded the allotted $1,500 budget. Mr. Warburton then left town for approximately a week. When he returned, Mr. Norton presented his summary for work time and supply receipts totaling approximately $4,500. On December 6, 2005, Mr. Warburton and Mr. Van Adams paid Mr. Norton $4,000 and then surveyed the project, which was still incomplete. Mr. Norton was told to wrap up the job and he responded he would in one day.

Mr. Warburton was then bed ridden for the next ten days due to pneumonia and was not able to get to the site. When he was better he visited the site once a week, up until December 23, 2005. On that date, while Mr. Van Adams visited the property, Mr. Norris asked for an additional $9,800. Mr. Van Adams refused, advising him he was already paid, and ordered him off the rental property. Mr. Norris threatened Mr. Van Adams physically and later, sent him letters threatening to make reports to INS.

On December 26, 2005, Mr. Norris was at the job site lifting his air compressor into his truck when he allegedly injured his back. On January 27, 2006, Mr. Norris first reported back pain, among other ailments, to his doctor.

DISCUSSION AND CONCLUSION OF LAW

The issue before the Commissioner is whether Mr. Norris was an employee of Mr. Van Adams and injured in the course of his employment or whether he was an independent contractor and therefore not entitled to benefits. Section 34A-2-103(7)(a) of the Workers' Compensation Act provides "[i]f any person who is an employer procures any work to be done wholly or in part for the employer by a contractor over whose work the employer retains supervision or control, and this work is a part or process in the trade or business of the employer" the contractor is considered an employee of the original employer.

In Bennett v. Industrial Commission of Utah, 726 P.2d 427 (1986), the Utah Supreme Court held:

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[1] The Commission notes Mr. Norris testified that he was offered $40 an hour to complete the project. However, after reviewing the evidentiary record, the Commission finds the other testimony more credible.

> Many factors have been applied in determining the right to control. Among those factors are actual supervision of the worker, the extent of the supervision, the method of payment, the furnishing of equipment for the worker, and the right to terminate the worker. Although these factors are not inclusive, they are relevant in many cases . . . . Id. at 430 (citations omitted).

In this case, Mr. Norris was advised he would be paid a certain amount of money to perform a job—cleaning and fixing up three vacant and vandalized units. When the supplies exceeded that initial amount, Mr. Van Adams authorized another payment and advised him to get it done. Mr. Norris provided his own tools for the work, used his own truck, and was responsible for purchasing most of the supplies for the work, with the exception of the cleaning supplies that he was told he could use. Mr. Norris had no supervision over his work and he decided his own work schedule for completing the project. Several days after starting the project, Mr. Warburton came to see the progress and expressed his frustration that it was taking so long. He visited the site approximately three additional times over the next few weeks, on one occasion accompanied by Mr. Van Adams wherein they expressed additional frustration with the delay. This minimal interaction did not amount to any form of supervision over Mr. Norris. Further, the work Mr. Norris performed was not "part or process in the trade or business" of Mr. Van Adams' business, as required under the statute. The Commission finds under the facts of this case that Mr. Norris acted as an independent contractor and was not an employee of Mr. Van Adams.[2]

Mr. Norris also argues that his claim should not be dismissed with prejudice. However, Mr. Norris had the opportunity to fully argue and litigate his claim and was unsuccessful. The facts show he is not entitled to workers' compensation benefits. Thus, it was appropriate to dismiss the claim with prejudice.

Finally, Mr. Norris argues that the principals of workers' compensation law in this state required the Commission to liberally construe the law in favor of awarding benefits. However, this principal does not relieve Mr. Norris from establishing he is entitled to benefits by a preponderance of the evidence, which he did not do.

The Commission concludes that because Mr. Norris was not an employee injured in the course of his employment, he is not entitled to workers' compensation benefits for his injuries. The Commission hereby amends Judge Lima's decision to conclude that Mr. Norris was not an employee of Mr. Van Adams either prior to or at the time of the alleged injury, and affirms her decision denying benefits.

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[2] The Commission notes that regardless of whether Mr. Norris had proven he was an employee of Mr. Van Adams, the employment relationship had ended at the time of the accident. Thus, Mr. Norris would still not have been entitled to workers' compensation benefits.

ORDER

The Commission amends Judge Lima's decision, as consistent with this order, and affirms Judge Lima's decision denying benefits. It is so ordered.

Dated this 28th day of August, 2009.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Amending ALJ's Decision and Affirming Denial of Benefits in the matter of Richard Norris, Case No 06-0127, was mailed first class postage prepaid this 28th day of August, 2009, to the following:

Richard Norris
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Sara Danielson
Utah Labor Commission